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Convention on jurisdictional immunities of States and their property

Convention on jurisdictional immunities of States and their property

Report of the Secretary-General**

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* A/55/150.
** The present report contains the text of replies received as at 15 August 2000.

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I. Introduction

1. In paragraphs 1 and 2 of its resolution 54/101 of 9 December 1999, entitled "Convention on jurisdictional immunities of States and their property", the General Assembly took note of the report of the Working Group of the International Law Commission on jurisdictional immunities of States and their property, annexed to the report of the Commission on the work of its fifty-first session;[1] urged States, if they had not yet done so, to submit their comments to the Secretary-General in accordance with General Assembly resolution 49/61 of 9 December 1994, and also invited States to submit in writing to the Secretary-General, by 1 August 2000, their comments on the report of the Working Group.

2. In paragraph 2 of its resolution 49/61, the General Assembly had invited States to submit to the Secretary-General their comments on the conclusions of the chairman of the informal consultations held pursuant to Assembly decision 48/413 of 9 December 1993, and on the reports of the Working Group established under Assembly resolution 46/55 of 9 December 1991 and decision 47/414 of 25 November 1992.

3. By a note dated 26 January 2000, the Secretary-General invited States to submit comments in accordance with paragraph 2 of resolution 54/101.

4. The present report contains the replies received as at 15 August 2000. Any replies received subsequently will be reproduced as an addendum to the present report.

5. The present report supplements the replies received from States pursuant to paragraph 2 of General Assembly resolution 49/61 (see A/52/294). The report also supplements replies received from States pursuant to paragraph 2 of resolution 52/151 of 15 December 1997, in which the Assembly also urged States, if they had not yet done so, to submit their comments in accordance with General Assembly resolution 49/61 (see A/53/274 and Add.1 and A/54/266).

II. Replies received from States

Chile

[Original: Spanish]
[8 May 2000]

Introduction

1. Chile shares the view that the work accomplished by the International Law Commission on the topic of jurisdictional immunities of States and their property is of great importance and that its success will contribute to the security of international relations and therefore to international peace.

2. In particular, Chile is of the view that the topic under consideration is one where the interests linked to the very nature of States must be reconciled sufficiently with those of individuals, so that, while respect is ensured for the sovereignty of the former, timely justice is guaranteed to the latter.

3. The sovereignty of States implies not only that they cannot be brought before courts of other States, but also that their respective laws are enforced in their territories and that, accordingly, the cases in which their own courts cannot exercise jurisdiction should be truly exceptional.

4. Moreover, the obligation to dispense justice implies the guarantee that the sovereignty of foreign States will not be used to leave individuals in a defenceless state.

5. Chile is therefore of the view that the text under consideration achieves a satisfactory balance between the two objectives referred to above, although at times it would appear to depart from the concern with not infringing the principle of sovereignty and, in particular, that of State immunity from jurisdiction.

General comments

6. In that connection, the text would appear to be aimed at reflecting a reality, namely, that the conduct of States does not always take place under the shelter of *jure imperii*, but rather, with increasing frequency, according to *jure gestionis* — a reality which, however, has not yet been transformed into a general norm.

7. That would perhaps explain why most of the draft articles refer to proceedings in which State immunity

cannot be invoked, in circumstances which might perhaps call for further development of the provisions relating to the general principle governing immunity. From that standpoint, it would probably be more accurate to state at the outset: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State, except in the cases and under the conditions provided for in the present articles." That would be a forceful reaffirmation of the general principle without prejudice to the exceptions specifically mentioned in the text.

8. In a similar vein, it would appear to be more logical to indicate, again as a general principle and a continuation of the previous statement, that: "The immunity from jurisdiction of a State shall be considered to have been infringed if a proceeding is instituted against it before a court of another State or if, in another proceeding, measures of constraint are decreed against it or taken against its property, and for as long as such a proceeding or such measures continue." In this way it would be clearer that where a right exists, so does an obligation which, if violated, entails international responsibility.

9. Accordingly, rather than referring to "modalities for giving effect to State immunity", the draft articles should refer to "the obligation of the State before whose courts a proceeding of any nature has been instituted against another State or in which, in another proceeding, measures of constraint have been decreed against that State or taken against its property, to respect the immunity from jurisdiction of that State in the respective proceeding".

10. In other words, the obligation of the State should be not only to "ensure that its courts determine on their own initiative that the immunity of that other State is respected", but to ensure that such immunity is actually respected, irrespective of whether or not it is determined by the courts. The latter is an internal matter or one under the exclusive jurisdiction of the State concerned. On the other hand, the obligation to respect immunity from jurisdiction is international and is within the scope of diplomatic relations.

11. Nevertheless, for the purposes of guaranteeing justice, it should also be stated that: "Once the immunity from jurisdiction of a State has been recognized, it has an obligation to settle, together with the State that has recognized it, the dispute that gave rise to the proceeding in question by one of the peaceful methods of dispute settlement in force between them." Thus, immunity from jurisdiction could not be used for the purposes of impunity or evasion of justice.

12. Moreover, it would be useful if, at the same time, it was stated that "immunity from jurisdiction does not relieve a State of the obligation to respect the laws of the State in which it operates". It would thus be crystal clear that, on the one hand, immunity from jurisdiction, as an expression of the sovereignty of any State, should not affect the sovereignty of other States and, on the other hand, that the failure to respect such laws may give rise to a separate international dispute between the States concerned and that, accordingly, it should be settled by one of the peaceful means of dispute settlement provided for in international law.

13. It would also appear to be absolutely necessary to provide, also as a general principle and with greater precision, that "immunity from jurisdiction is a right of the State which it alone can expressly waive". A statement of this type would make it possible to determine further, or more rapidly, what forms such a waiver might take.

14. In the light of the foregoing, Chile believes that the general structure of the draft articles should be as follows: Part I, Introduction; Part II, General principles; Part III, Waiver of immunity from jurisdiction; Part IV, Exceptions to immunity from jurisdiction; and Part V, Miscellaneous provisions.

Part I — Introduction

15. With regard to the use of terms, Chile believes that it would be necessary to provide a concept of immunity from jurisdiction, so that, on the one hand, the scope of the articles is properly understood and, on the other hand, not only is the concept derived from the other articles, but also the latter from the former.

16. Accordingly, article 1 could indicate that: "The present articles apply to the right of a State, together with its property, not to be subject, either directly or indirectly, to the jurisdiction of the courts of another State, which is termed immunity." Or perhaps a subparagraph could be added to article 2, stating that: "'Immunity' means the right of a State, together with its property, not to be subject, either directly or indirectly, to the jurisdiction of the courts of another State."

17. This would already emphasize that what is involved is a right (which can therefore be waived), consisting of the fact that, in general, the courts of another State are not entitled to hear, resolve and enforce judgements in cases involving a State.

18. With regard to the use of terms, it would appear to be necessary, on the one hand, to harmonize the term "court", which is used in the present draft articles, with the concepts used in the draft articles on State responsibility and, on the other hand, to clarify what is meant by "judicial functions".

19. In this connection, it could be stated that "'Court' means any organ of a State, however named and situated, entitled, under the domestic law of that State, and provided that it is acting in that capacity, to exercise judicial functions (or to hear, resolve and enforce judgements in civil, criminal and administrative cases)". Thus, judicial functions would include all the courts of a State, including arbitral, administrative and electoral tribunals.

20. With regard to the term "State", Chile believes that it could be illuminating to go through the exercise of providing an idea of what the term would not be considered to include. Accordingly, Chile supports the idea of adding the following sentence: "For the purposes of the present articles, the term 'State' shall not be considered to include organs, entities and enterprises established with a separate legal personality so that their own assets may be liable and they may act not in the exercise of its governmental authority."

21. With specific reference to the constituent units of a federal State and the political subdivisions of a State, Chile is of the view that it is not important to provide that both the units and the subdivisions enjoy immunity per se, in other words, independently of the State to which they belong; rather, as they are a part of that State and act in exercise of its governmental authority, for the purposes of immunity it should be considered that it is the State itself which acts.

22. In other words, Chile agrees that there should be a certain relationship between the legal institutions of international State responsibility and jurisdictional immunities of States. From that standpoint, it believes that no scope should be left for an interpretation that might lead to the belief that the constituent units of a federal State and the political subdivisions of a State always have or might have a degree of international legal subjectivity independent of that of the State to which they belong.

23. Accordingly, the formula proposed in article 2, paragraph 1 (b) (ii), as reformulated in document A/CN.4/L.584/Add.1, appears to be acceptable. This includes the phrase in brackets, which — because it refers to the important condition that, in order for immunity to be effective, the constituent units of a federal State and the political subdivisions of a State must have acted in exercise of the governmental authority of that State — should also be added to subparagraph (iii) of the article in question.

24. With regard to the term "commercial contract", Chile is of the view that in order to cover the broadest possible range of possibilities, it could be replaced by the term "commercial act", which would include "any commercial operation, commercial obligation and commercial contract". At the same time, Chile shares the view that no express reference should be made to either the nature or the purpose of a contract or transaction in determining its commercial nature, and therefore also believes that article 2, paragraph 2, as contained in document A/CN.4/L.584/Add.1, should be deleted.

25. Chile also supports the idea of making it quite clear in the draft that "nothing in these articles may be interpreted or applied as restricting the privileges and immunities which a State and its agents enjoy under other conventions and general international law", although such a provision would be placed at the end of the text, under "Miscellaneous provisions".

26. A provision concerning the non-retroactivity of the articles would also be placed at the end.

Part II — General principles

27. As indicated above, this part of the draft articles should include the following ideas, successively:

> "(a) A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State, except in the cases and under the conditions provided for in the present articles;
>
> "(b) The immunity from jurisdiction of a State shall be considered to have been infringed if a proceeding is instituted against it before a court of another State or if, in another proceeding, measures of constraint are decreed against it or

taken against its property, and for as long as such a proceeding or such measures continue;

"(c) The obligation of the State before whose courts a proceeding of any nature has been instituted against another State or in which, in another proceeding, measures of constraint have been decreed against that State or taken against its property, to respect the immunity from jurisdiction of that State in the respective proceeding;

"(d) Once the immunity from jurisdiction of a State has been recognized, it has an obligation to settle, together with the State that has recognized it, the dispute that gave rise to the proceeding in question by one of the peaceful methods of dispute settlement in force between them;

"(e) Immunity from jurisdiction does not relieve a State of the obligation to respect the laws of the State in which it operates;

"(f) Immunity from jurisdiction is a right of the State which it alone can expressly waive."

28. Accordingly, Chile would be in favour of reformulating articles 5 and 6 of the draft so that one or more of their provisions would reflect the ideas set forth above, it being unnecessary, therefore, to provide further clarifications as to when a proceeding shall be considered to have been instituted against a State or a measure of constraint shall be considered to have been decreed against it or taken against its property.

Part III — Waiver of immunity from jurisdiction

29. Chile is also of the view that the provisions in articles 7, 8 and 9 of the draft should be grouped under the heading "Waiver of immunity from jurisdiction", since what is actually dealt with in those provisions are cases in which the State voluntarily agrees, expressly or implicitly, that despite enjoying immunity from jurisdiction, it and its property shall be subject to the jurisdiction of the courts of another State.

30. Accordingly, the wording of those articles should express the idea that "a State shall be considered to have waived its immunity from jurisdiction" in the cases referred to therein.

31. From this standpoint, Chile supports the idea that article 7 (c) of the draft should state that one of the means of expressing waiver of immunity from jurisdiction or consent to the exercise of jurisdiction by the respective court should simply be "a written statement submitted to the court", without, however, indicating by whom or at what point the statement is to be submitted, so as to ensure the greatest possible flexibility in this regard.

32. Chile also believes that article 8, paragraph 2 (b), of the draft should state more specifically that the purpose of the intervention in question would be "preventing the results of the proceeding from jeopardizing certain rights of the State concerned, which, however, would not become a direct party to the proceeding". This might make it clearer that what is involved is a "mediation" or "third-party intervention" — a situation, therefore, in which immunity from jurisdiction would not be waived.

33. With regard to counter-claims, Chile leans towards the version adopted earlier, with, of course, the drafting changes necessary for the purposes expressed therein, namely, that the situation in question is one in which the State is considered to have waived its immunity from jurisdiction.

34. With regard to the concept of a State enterprise or other entity established by the State in relation to a commercial transaction, Chile notes that the final suggestion contained in paragraph 80 of document A/CN.4/L.584/Add.1 could be acceptable, provided, of course, that its wording is revised to reflect reality to its fullest extent. It would then state clearly and directly that State immunity does not cover commercial acts engaged in by a State enterprise or one in which the State is or has been a shareholder or partner, or by an entity established by the State or to which the State belongs or has belonged, not even if the State has guaranteed or acts as guarantor of compliance with the obligation(s) arising or emanating from such commercial acts.

Part IV — Exceptions to immunity from jurisdiction

35. As noted above, the situations envisaged in articles 11 to 17 of the draft are merely cases in which the State in question simply has no immunity from jurisdiction. Accordingly, what is involved are not situations in which the State "cannot invoke", as the

text puts it, such immunity, but ones in which it simply does not apply.

36. For this reason, it would probably be necessary to introduce a general norm to replace several of those mentioned, stating as follows:

> "Unless otherwise agreed between the States concerned or the parties to the respective contract or agreement, as appropriate, a State shall not be considered to have immunity from jurisdiction in proceedings instituted in courts of another State concerning acts in which it has participated other than in the exercise of its governmental authority and which such courts are entitled to hear and adjudge under private international law. In particular, a State shall not have immunity in proceedings relating to:
>
> (a) Commercial acts engaged in by the State with foreign natural or juridical persons;
>
> (b) The validity or interpretation of an arbitration agreement or an arbitration procedure or the setting aside of the award in any dispute relating to a commercial act;
>
> (c) Actions for compensation for death or injury to a person, or damage to or loss of tangible property, resulting from acts attributable to the State and occurring in that other State;
>
> (d) The exercise by the State of actions or rights connected with the ownership, possession and occupation of immovable and movable property and embodied in or arising from private law norms in that other State;
>
> (e) Fiscal obligations of the State in that other State; and
>
> (f) Cargo carried on board a ship operated by the State, whether owned by it or not, or that ship, which, at the time the cause of action arose, was used or intended for use exclusively for commercial purposes."

37. It would thus be possible to include in a single provision all the similar situations in which State immunity from jurisdiction would not apply and have them sheltered under a general norm, namely, that the State does not enjoy immunity from jurisdiction in cases in which it acts according to *jure gestionis*.

38. Such a general norm, which would thus include certain specific cases by way of illustration, should moreover, be as simple as possible, to allow for its subsequent development in accordance with the jurisprudence and practice of States, particularly in all matters relating to regulatory issues.

39. In addition to the above, another provision should envisage a different situation, in which the State does not enjoy immunity from jurisdiction either, but for different reasons. This would be the provision relating to "contracts of employment entered into between the State and individuals recruited in that other State to perform functions in it, with the exception of contracts entered into for the performance of functions related to the exercise of governmental authority or signed with nationals of the employer State at the time the proceeding is initiated, or with persons who, at the time the contract is signed, are neither nationals nor habitual residents of that other State".

40. On the same topic, Chile shares the views of the Working Group, as set forth in paragraphs 104 and 105 of document A/CN.4/L.584/Add.1, making it clear that what is involved are persons who perform functions related to the exercise of governmental authority. It cannot, however, endorse what is stated in paragraph 106 of that document with regard to deleting subparagraph (c) of paragraph 2 of article 11 of the draft articles. While it is true that such a norm would affect the principle of non-discrimination based on nationality, it is also true that that provision also envisages the case of a person who is not a habitual resident of the State of the forum. This situation is completely different from the previous one and might perhaps be expressed in a different way, namely, that State immunity will apply in cases relating to a contract of employment in which the employee, who is neither a national nor a habitual resident of the State of the forum, entered that State specifically in order to sign that agreement.

41. In addition, because it relates to a completely different situation, another provision should stipulate that "organs, entities or enterprises established by a State with separate legal personality so that their own assets may be liable and they may act not in the exercise of its governmental authority, shall not enjoy the immunity from jurisdiction to which that State is entitled". This provision should perhaps follow the one which proclaims State immunity from jurisdiction as a basic principle.

42. Generally speaking, the foregoing would encompass all the situations provided for in the draft articles, including the specific cases referring to rights over immovable and movable property and, among these, the ones relating to patents of invention, trademarks and other kinds of intellectual property and to participation in companies — all movable rights — without, however, encroaching on the branches of law specifically regulating one or the other.

43. Chile is of the view that the draft articles should not include a provision relating to nationalization, as it is foreign to the central purpose of the draft.

44. It also believes that what is provided for under "measures of constraint" would already be included in the general norms outlined above. Furthermore, it should be kept in mind that measures of constraint against property of a State can only be decreed in the context of a proceeding, which would mean subjecting the State to that proceeding. In this connection, Chile is in favour of first establishing the principle of a prohibition on execution and then stating the specific exceptions thereto, as currently set forth in article 18 of the draft articles. This does not preclude adding to those exceptions the ones provided for in paragraph 127 (c) and (d) of document A/CN.4/L.584/Add.1, namely, "measures available under internationally accepted provisions" and "measures involving property of an agency enjoying separate legal personality if it is the respondent of the claim".

45. On the other hand, Chile is in favour of having the provision concerning State property — which, barring agreement or consent to the contrary, should not be sheltered under the immunity from jurisdiction of the State — appear as a special provision following the general norm which establishes the situations in which the State does not enjoy immunity from jurisdiction.

46. Chile is also of the view that the provision referring to the special property which is not considered to be used or intended for use by the State for commercial purposes should be included after the above-mentioned one.

47. Lastly, Chile does not see the practical utility of distinguishing between prejudgement measures and post-judgement measures. In the first place, the draft articles are not intended as a set of norms on judicial procedure. Secondly, it is not clear whether prejudgement measures include so-called prejudicial ones — in other words, measures adopted prior to the proceeding as such — or only so-called precautionary ones, adopted in the context of the respective proceeding. Thirdly, post-judgement measures are inherent in what is known as execution of judgements. All of this, as has been implied, goes beyond the scope of the draft articles. Nor, by the same token, does Chile endorse the idea at the current stage of the work of providing variants regarding compliance by the State with the judgement, as set out in paragraph 129 of document A/CN.4/L.584/Add.1. It prefers, rather, that the draft articles not deal with any of these possibilities.

Miscellaneous provisions

48. Chile wholeheartedly supports the formula proposed by the Special Rapporteur under this heading, to the effect that: "Unless otherwise agreed, notification of the institution of a proceeding against a State or the decree of measures of constraint against it or its property shall be effected through the diplomatic channel."

49. In this connection, Chile wishes to suggest that another provision be added, stating that "the State shall also assert its immunity from jurisdiction through the Ministry of Foreign Affairs of the State of the forum". In other words, what should be crystal clear is that the State is under no obligation to submit, except in the cases referred to above, to the jurisdiction of a court of another State, not even in order to assert its immunity from jurisdiction, and that if this is not respected, the matter becomes a diplomatic one, in other words, an issue between the States concerned and not between the organs of the two States.

50. With reference to what the draft articles term a "default judgement", Chile is of the view that this provision should not appear in the text. If the State has immunity from jurisdiction, the judgement would not impede or affect it in any way, and if it does not have immunity from jurisdiction, it would have to conform to the respective procedural norms, which include periods for service of process.

51. Moreover, Chile considers that what is set forth in the draft articles regarding measures of constraint has been incorporated into the suggestions it made above, particularly with regard to general principles.

52. Likewise, Chile is of the view that the provision in the draft articles concerning "procedural

immunities" does not appear to be necessary, in that it is implied in the very concept of immunity from jurisdiction.

53. With regard to the provision relating to "non-discrimination", Chile believes that it could be redundant and should therefore be deleted.

54. Lastly, Chile would not consider it essential that, in the context of a set of draft articles on jurisdictional immunities, an effort be made to regulate a system for settling disputes arising from the interpretation or application of the articles. In view of its complexity, it would be better if the topic of dispute settlement were discussed separately, thus preventing any doubts or hesitations on the subject from impeding the adoption or ratification of the respective treaty.

Conclusions

55. By means of the foregoing, Chile has sought to demonstrate the priority it attaches to the topic in question and to an international convention that would clarify not only the current status of customary law, but also the degree of consensus reached by States in this regard.

56. From this standpoint, what Chile is proposing is not the enshrinement of the theory either of absolute immunity or of restrictive immunity, but rather that the draft articles should reflect what is actually the subject of agreement, namely, that in the absence of a uniform practice among States, it is necessary to determine, as far as possible, what is meant by immunity from jurisdiction and what exceptions there are to it.

57. In a similar vein, Chile wishes to reiterate that the work involved in the preparation of a set of draft articles like the one under consideration means not only that the text must reflect international custom in this area, but also that it must allow for the progressive development of the relevant norms. This is all on condition, however, that such an effort, and the norms arising from it, do not constitute a source of conflict in their own right.

58. To this end, it must be recognized that while the law cannot define certain concepts at times, that does not mean that the realities which such concepts are intended to reflect do not exist. This is true, for example, of the concepts of *jure imperii* and *jure gestionis* in the topic under consideration.

59. If the foregoing is accepted, it might be possible to trust that the norms by which we seek to regulate various aspects of the conduct of States will be developed in the framework of their underlying logic and will thus serve the purposes for which they are established.

Libyan Arab Jamahiriya

[Original: Arabic]
[27 June 2000]

The Libyan Arab Jamahiriya submitted the following:

Act No. 21 of 1954 on Privileges and Immunities, 27 April 1954

We Idris I, King of the United Kingdom of Libya,

The Senate and the House of Representatives having approved the Act on Privileges and Immunities of 1954 set forth below, have endorsed and promulgated it:

Section I
Diplomatic representatives

Article 1
Immunity of the diplomatic representative and inviolability of his residence, his office and his papers

A diplomatic representative in Libya shall enjoy the following immunities accorded by international law to representatives of foreign States:

(a) Immunity in respect of prosecution and the institution of legal proceedings against him;

(b) Inviolability of his residence, his office and his official papers.

Article 2
Exemption from taxation

A diplomatic representative shall be exempt from payment of taxes on his salary or on income accruing to him from his official activities or from sources outside the United Kingdom of Libya.

Article 3
Dues

A diplomatic representative shall be exempt from payment of local and other similar dues with regard to his residence or office, except those paid in respect of services. He shall also be exempt from licensing and registration taxes with regard to his residence, automobile, wireless receiver, weaponry, dogs or hunting equipment.

Article 4
Customs duties

1. He shall be exempt from inspection of diplomatic property belonging to the diplomatic mission and from payment of customs duties on items imported for his personal or official use.

2. Other diplomatic representatives shall be exempt from inspection of their property and from customs duties in accordance with measures to be determined by the Minister for Foreign Affairs in accordance with the principle of reciprocity.

Article 5
Persons enjoying diplomatic immunity and privileges

1. For the purpose of this Act, the term "diplomatic representative" means:

(a) The head of a foreign diplomatic mission;

(b) Any of the members of the diplomatic staff of the mission.

2. The members of the staff of the mission employed directly by the head of the mission shall enjoy the privileges and immunities set forth in articles 1 and 2. However, a staff member or servant who is not of the nationality of the sending State shall not enjoy any of the privileges and immunities provided for in section I of this Act, with the exception of immunity from prosecution or legal action against him in any matter related to actions performed in the course of the performance of his official duties.

Section II
Consular officers

Article 6
Immunity of consular officers

A consular officer in Libya shall enjoy:

(a) Immunity from legal proceedings in respect of actions performed in his official capacity;

(b) Inviolability of his official papers.

Article 7
Exemption from taxation and customs duties

A consular representative shall be exempt from taxation on his salary and any income accruing from his official actions. He shall be exempt from payment of customs duties on items imported for his official use and, within reasonable limits, on items imported for his personal use during the first 12 months following his arrival in Libya, provided that the Minister for Foreign Affairs approves exemption measures on the principle of reciprocity.

Article 8
Persons enjoying consular immunities and privileges

1. For the purpose of this Act, the term "consular officer" means a consul-general, a consul, a vice-consul or consular agent as appointed by the foreign State.

2. An official member of the consular staff assigned to the consular officer shall enjoy the privileges and immunities accorded in articles 6 and 7, with the proviso that a member of the consular staff who is not of the nationality of the sending State shall enjoy only the immunities provided for in article 6 of this Act.

Section III
International organizations

Article 9
International and intergovernmental organizations

The United Nations, the specialized agencies and intergovernmental or international organizations to which the Minister for Foreign Affairs shall apply the provisions of this article by an order promulgated by him shall enjoy all the privileges and immunities enjoyed by the heads of diplomatic missions under section I of this Act, and the publications of the United Nations and the above-mentioned agencies and organizations and their imports and exports utilized for their official purposes shall be exempt from restrictions.

Article 10
Legal persons

The United Nations, the specialized agencies and international or intergovernmental organizations to which the Minister for Foreign Affairs shall apply the provisions of this article by an order promulgated by him shall enjoy legal personality in Libya.

Article 11
Personal representative of the Secretary-General and judges of the United Nations

The personal representative in Libya of the Secretary-General of the United Nations and judges of the United Nations court in Libya shall enjoy the privileges and immunities enjoyed by heads of diplomatic missions under section I of this Act.

Article 12
Members of staff

Members of the staff of the United Nations and of other organizations or bodies designated by the Minister for Foreign Affairs by an order to be promulgated by him under article 9 of this Act shall enjoy the privileges and immunities set forth in articles 6 and 7 of the Act.

Section IV
General provisions

Article 13
Other privileges and immunities

Diplomatic representatives, consular officers, the organizations, bodies and persons mentioned in section III of this Act and other persons shall enjoy the other privileges and immunities accorded them by international law or any agreement to which Libya is a party.

Article 14
Spouses and children

Spouses and unmarried children under the age of 18 and unmarried daughters over 18 years of age shall enjoy the privileges and immunities of a diplomatic representative, and the same provision shall apply to the spouses and children of staff directly employed by the head of the diplomatic mission and the persons referred to in article 11.

Article 15
Waiver of immunities

The persons referred to in sections I and II of this Act and their spouses, children and servants shall not enjoy immunities if the head of the mission waives their immunity. The organizations, bodies and persons, and their spouses, children and servants, referred to in section III of this Act, shall not enjoy immunities if the organization, body or person waives such immunity or if such immunity is waived.

Article 16
Refusal to grant immunities and privileges

The provisions of this Act shall not preclude the refusal of the Government to grant privileges or immunities to any diplomatic representative or consular officer of any State that does not grant reciprocal privileges or immunities to the diplomatic representatives or consular officers or staff members of Libya.

Article 17
Testimony of the Minister

Where the issue of a privilege or immunity or of any person or body is raised in any court or in any other manner, the testimony of the Ministry of Foreign Affairs shall be deemed to be conclusive.

Article 18
Abrogation

Declaration No. 208 of 1950 on Immunities and Privileges issued at Tripoli and Act No. 21 of 1951 on the Privileges and Immunities of the United Nations promulgated at Barca are hereby abrogated.

Article 19
Name of the Act and entry into force

This Act shall be called "the Act on Privileges and Immunities of 1954" and shall enter into force from the date of its publication in the *Official Gazette*.

Pakistan

[Original: English]
[27 July 2000]

1. The doctrine of State immunity reached its culmination towards the end of the nineteenth century

when the laissez-faire doctrine was in vogue. In the beginning of the twentieth century, the laissez-faire doctrine began to decline with the spread of protectionism as well as intervention in economic life. The First World War lent impetus to the trend of State control over the economy. Meanwhile, the Russian revolution in 1917 was followed by State monopoly of foreign trade in the Soviet Union. State control of production and international trade, in particular of war materials and raw materials, thus became a common feature in the years following the First World War. Ever since there has been increasing involvement of the State in international trade and economic relations.

2. This prompted some States to re-examine the doctrine of State immunity. The trend in recent years seems to be that a distinction is made between *acta jure imperii* and *acta jure gestionis*. This trend has been strengthened recently and the United Kingdom of Great Britain and Northern Ireland, the United States of America, the European Union and various other States have joined this trend. Pakistan also enacted legislation along the same lines in 1981 in the State Immunity Ordinance (VI) of 1981.

3. The work of the International Law Commission over the years also emphasizes that it is essentially commercial activities of States in respect of which the immunities enjoyed by States are no longer considered to be justified. The detailed provisions relating to the commercial character of a contract or transaction drafted by the International Law Commission and its Working Group also clearly support this.

4. The dilution of State immunity in respect of claims for pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission attributable to the State in terms of article 12 of the text of the draft Convention has no basis in this evolution and would cause a great deal of friction between some developed countries where there is a strong tradition of tort litigation and developing countries, which would have to face expensive litigation which would definitely prove to be a source of friction between the two. Moreover, the provision makes no distinction between *acta jure imperii* and *acta jure gestionis*. It should therefore be deleted in order to make the draft Convention acceptable to a majority of States.

Saudi Arabia

[Original: Arabic and English]
[28 April 2000]

Comments on the draft articles

1. With regard to article 2 of the draft convention concerning the determination of the commercial character of the contract or transaction, both the nature of the contract or transaction and its purpose should be taken into consideration. No single criterion should be exclusively applied.

2. The draft convention should include an article establishing a mechanism for resolving differences between States regarding the interpretation or application of the draft convention.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10 and Corr.1 and 2).